1992

Eduardo S. Garza v. Tamara Holden : Brief of Appellant

Utah Court of Appeals

Paul Van Dam; Utah Attorney General; Angela F. Micklos; Assistant Attorney General; Attorneys for Appellee.

Eduardo S. Garza; Pro Se.

UTAH COURT OF APPEALS

EDUARDO S. GARZA Plaintiff/Appellant	*	Brief of Appellant
v.	*	Case no. 920622-CA
TAMARA HOLDEN Defendant/Respondent	*	Priority no. _____

BRIEF OF APPELLANT

Appeal from final judgement and denial dismissing appellant's petition for Writ of Habeas Corpus dated 3rd day of September, 1992 by the Honorable David S. Young Judge 3rd District Court in and for Salt Lake County, State of Utah.

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POINTS OF APPEAL

1. Whereas appellant is guaranteed effective counsel by the Constitution of the United States, Amendment VI (rights of the accused) and The Constitution of Utah, Article I section 12 (rights of accused persons), and Whereas, by statute and judicial interpretation that said counsel must be effective in that "proper functioning of the adversarial process" must take place to produce a just result." (Strickland v. Washington, 466 US at 689) [1]

2. Constitutions require "that no accused can be convicted and imprisoned, unless he has been accorded the right to assistance of counsel." (US v. Tolliver, 937 F.2d 1183 7th Cir. 1991)[2]

3. Defense attorney acted below an objective standard of reasonableness creating the probability that but for counsel's unprofessional errors the results of the proceedings would have been substantially different. Counsel's conduct so undermined the proper functioning of the adversarial process that the proceedings in this case, cannot be relied on as having produced a just result.

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[1] Stickland v. Washington, The benchmark then for judging any claim of ineffectiveness must be whether the counsel's conduct so undermined the proper functioning of the adversarial system that the trial cannot be relied on as having just result.

[2] US v. Tolliver, Constitution requires that no accused can be convicted or imprisoned unless he has been accorded the right to the assistance of counsel.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this court by the Utah Code Ann., Section 78-2A-3 (2)(f), (Court of appeal has jurisdiction over "Appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony").

STATEMENT OF ISSUES

A. Was counsel's performance below an objective standard of reasonableness ?

B. Does the reasonable probability exist that but for counsel's unprofessional errors, the result of the proceedings would have been different ? .

C. Did Counsel's conduct so undermine the proper function of the adversarial process that the proceedings, in this case, cannot be relied on as having produced just results ?

D. Did counsel's ineffectiveness prejudice appellant's defense resulting in loss of constitutional rights?

STATUTES AND CONSTITUTIONAL PROVISIONS

1. Constitution of the United States, Amendment VI (Rights of the Accused)
2. Constitution of the State of Utah, Article I, Section 12 (Rights of Accused Persons)
3. Utah State Code Ann. sec 78-2A-3(2)(f) (Jurisdiction)

STATEMENT OF CASE

Appellant was charged with a second degree felony of Criminal (Automobile) Homicide in that it was alleged he, as the actor, operated a motor vehicle while having a blood alcohol content of .08% or greater and caused the death of another.

Following arraignment and preliminary hearing, appellant, through defense counsel James Watts, negotiated with prosecution, a plea agreement with the following stipulation:

For the appellant / defendant:

1- dismissal of pending criminal charge.

2- agreement of all parties to induce the Court to sentence appellant / defendant on the next lower degree of offense (third degree felony).

For the prosecution:

1- A plea of guilty to a second degree felony, to wit: Criminal (Automobile) Homicide.

Said plea agreement was conceived from the notion of the shadow of criminal intent brought to bear from a promised affidavit from expert witness, Dr. David Boorman. At sentencing, before the Honorable Judge David S. Young, defense counsel James Watts, announced, first to the appellant/defendant, the incredibly impacting and subsequently hope shattering information that the key affidavit from Dr. Boorman would NOT be forthcoming. ,Counsel Watts then announced the same incredible news to the Court and prosecution.

Appellant argues that the incredibly inane, blatantly ineffective and obvious unprofessional errors in not procuring the affidavit nor continuing further court action, until either the document or expert witness could be produced, fell far below an objective standard of reasonableness and was so prejudicial, that but for the unprofessional errors, the results of the proceedings would have been different, resulting in loss of appellant's rights.

STATEMENT OF FACTS

This case was not tried, therefore there is no evidence to cite in support in a statement of facts. Information in this case is as follows:

Appellant was charged with Utah Code ann. 76-5-207 Criminal (Automobile) Homicide, being in the second degree punishable by 1 to 15 years in the State Penitentiary

Appellant pled guilty to said charge on 18 August 1989 before the Honorable David S. Young Judge Third Judicial District Court in and for Salt Lake County, State of Utah.

Appellant was sentenced on 28 September, 1989. by the Honorable Judge Young to confinement in the Utah State Prison to not less than one nor more than fifteen years and other appurtenances.

Appellant is currently incarcerated in the Utah State Prison.

SUMMARY OF ARGUMENT

Appellant argues:

That the Constitution of the United States, 6th Amendment and the Constitution of Utah article I section 12 guarantees the right of effective assistance of counsel in criminal prosecution.

That defendant was entitled to more than just a warm body standing next to him during the criminal procedure.

That no denial of effective assistance of counsel when attorney's representation is reasonable.

That the purpose of the effective assistance guarantee of the 6th Amendment is to ensure that criminal defendants receive a fair trial.

That judging any claim of ineffectiveness must be whether the counsel's conduct so undermined the proper functioning of the adversarial process that the proceedings cannot be relied on as having produced a just result.

That appellant's counsel, James Watts, presented himself as professional, reasonable, and effective in pursuit of appellant's defense and indeed was paid a retainer.

That discussions were held and conclusions were reached whereby counsel arranged with prosecution the terms of a plea agreement, wherein appellant would plead guilty to the charge in trade for the dismissal of a pending charge and agreement of all parties to induce the court to sentence the defendant under the next lesser degree. (3rd degree)

Argument

Appellant argues he is guaranteed the right of effective assistance of counsel by and through the Constitution of the United States Amendment VI.[3] Further, Appellant argues he is guaranteed the right of effective counsel by and through the Constitution of Utah Article I section 12.[4]

Further, United States Supreme Court, in interpreting the rights of criminal defendants, stated the purpose of the effective assistance guarantee of the VI amendment is to "... ensure that criminal defendants receive a fair trial". Strickland v. Washington, 466 US 668 (1984)[5]; McMann v. Richardson, 397 US 759, 771, n.14 (1970)[6]; Cuyler v. Sullivan, 446 US 335,344-45 (1980)[7]

Moreover, Appellant's entitlement extends beyond having just a warm body standing next to him during the criminal proceedings and reaches to effective assistance of counsel when attorney's representation is reasonable and applies to both retained and

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[3] Constitution of the United States Amendment VI - "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

[4] Constitution of Utah, Article I section 12 - "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel."

[5] Strickland at 689. - " the purpose of the effective assistance guarantee of the 6th amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."

[6] McMann v. Richardson - "Sixth amendment right to counsel is right to effective assistance of counsel."

[7] Cuyler v. Sullivan, "ineffective assistance may not be claimed for counsel's actions where no sixth amendment right to counsel exists."

appointed counsel.

Appellant's professional relationship with counsel, James Watts, predated the instant case and counsel's conduct seemed satisfactory to the Appellant taking into account the variety of circumstances faced by counsel and seemingly legitimate decisions regarding how best to represent criminal defendants.

Seeking to ensure Appellant's right to a fair trial through proper functioning of the adversarial process to produce a just result, Appellant retained services of counsel seeking reasonable representation.

Counsel, on its own, conceived and initiated a course of action presented to Appellant in several brief meetings; the reasonableness of the proposal and the tactical decisions were accepted as a tolerable compromise.

Presented was a proposal wherein Appellant would plead guilty to 2nd degree Criminal Homicide in exchange for Prosecution's support of Appellant's being sentenced to the next lower severity of crime (3rd degree felony) and prosecution's motion for dismissal of pending criminal action. As an inducement counsel, in colloquy with prosecution, represented the acquisition and presentation of a certain affidavit from one Dr. David Boorman. Defense counsel, in furtherance of his methodology, purported this expert witness' affidavit would indicate a significant lessening of Appellant's culpability due to an adverse and debilitating drug interaction resulting from said doctor's prescribed use in concert with doctor's assurance to Appellant that no adverse effect would result in mixing prescribed medication and moderate alcohol intake.

In its landmark decision Strickland v. Washington[8], the benchmark for judging any claim of ineffectiveness of counsel "must be whether the counsel's conduct so undermined the adversarial process, that the trial cannot be relied on as having produced a just result"; and further "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel of the range of legitimate decisions regarding how best to represent the criminal defendant."

In Bertolotti v. Dugger[9], 838 F.2d 1503, 1510 (11th Cir. 1989). The court stated "review of assistance should not grade counsels performance, but focus on fundamental fairness of challenged proceedings." These and many other cases led to the Strickland Court assertion "a reasonable probability [of ineffectiveness] is a probability sufficient to undermine confidence in the outcome.".

Georgetown Law Journal concludes (Vol 79 #4 p 969 Ineffective Assistance of Counsel) "The 6th Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. In Strickland v. Washington the Supreme Court established a two pronged standard to govern ineffective assistance claims. The defendant must prove (1) That counsel's performance fell below an

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[8] see footnote 1, at 688-689

[9] Bertolotti v. Dugger, "Federal Court of appeal's role in collaterally reviewing state judicial proceeding on ineffective assistance claim is not to point out counselor's error, but only to determine whether counselor's performance in given proceedings was so beneath providing professional norms that attorney was not performing as `counsel' guaranteed by Sixth Amendment."

objective standard of reasonableness and (2) That there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."

Appellant concurs and so argues.

Counsel proposed said agreement; Prosecution reticently agreed; Appellant, reassured by defense counsel, reluctantly agreed; The "Deal was Struck", and the case proceeded to sentencing.

Reciproque to the plea bargain, which was not representative of the Appellant's view, the sentencing on the next lower severity of crime gave way to legislated rationale in-that criminal homicide in the second degree (to which the appellant plead guilty) requires "willful, knowing, and reckless gross deviation from the standard of care that a normal person would exercise", where-as lacking absolute culpability (as appellant asserts) is criminal homicide in the third degree (to which the appellant would be sentenced) requires "simple negligence, the failure to exercise that degree of care which reasonable and prudent persons exercise."

Prosecution's part in the agreed plea bargain was to move for dismissal of an existing apart charge, with which there is no argument. Secondly, they were to speak with their silence in favor of the motion by counsel for sentencing under the next lesser degree of crime.

Although the Appellant's plea of guilty "is not voluntary simply because it is the product of sentient choice, but is involuntary if, though it involves a choice, it is the result of

duress". Heidman v. US, C.A. 8th 1960 281 F.2d 805.[10]

"We cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state." Brady v. US, 90 S.Ct. 1463[11]

Federal Rules of Criminal Procedure Rule 11(e) allows plea agreements that require the defendant to plead guilty to the charged offense, in agreement prosecutor is authorized to (1)[12] move for dismissal of other charges; (2)[13] Agree not to oppose defendants request for a particular sentence. (3)[14] To agree that a specific sentence is appropriate for the disposition of the case.

Defense's part in the agreed plea bargain was to, of course, have appellant plead guilty; however, central to the core of the plea agreement was the procurement and admission, to the Court, of the promised affidavit from Dr. Boorman, appellant's post heart-attack physician.

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[10] Heidman v. US, "A plea of guilty is not voluntary simply because it is a product sentient choice, but is involuntary if though it involves a choice, it is a result of duress."

[11] Brady v. US, "We cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state ... "

[12] Federal Rules of Criminal Procedure, Rule 11(e)(1) Plea agreement procedure in general. The attorney for the government and the attorney for the defendant ... engage in discussions with the view towards reaching an agreement that, upon the entering of a plea of guilty ... to a charged offense ... the attorney for the government will do any of the following:
(A) - Move for dismissal of other charges.

[13] Id. (B) - Make recommendations or agree not to oppose the defendant's request for a particular sentence.

[14] Id. (C) - Agree that a specific sentence is the appropriate deposition of case.

The Court, the Prosecution, and the Appellant, in unison, anticipated the production and admission of said document and indeed it was predicate to the plea agreement.

Appellant's decision to participate in the plea agreement, via his guilty plea, and prosecution's agreement to speak by their silence in support of reduction of sentencing, was held together by the very glue of the production of this document. Indeed the very life blood that gave the agreement viability, was the admission of this document.

A plea agreement is generally treated as a contract, the instant case included; Thus it may be breached. Santobello v. New York, 404 US 257 1971 [15]; US v. McCarthy, C.A. 1st. 1970, 433 F.2d 591[16].

On the morning of Sept. 29th, 1989, (42 days after the appellant plead guilty as his part of the plea agreement) before the Honorable David S. Young Judge Third Judicial District in and for Salt Lake County, State of Utah, came the time fixed for the sentencing of the appellant. As a matter of course all parties concerned, the defendant, the prosecution (Mr. Scott Reed), and the Judge, anticipated and expected the production and admission of Dr. Boorman's affidavit at the hands of the defense counsel James Watts.

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[15] Santobello v. New York, When a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of an inducement or consideration, such promise must be fulfilled.

[16] US v. McCarthy, "Sentence based on guilty plea induced by reliance on unfulfilled prosecution promise."

The Defense counsel, seconds before announcing same to the Court, informed the appellant of the unbelievably destructive news that he had NOT obtained the affidavit from Dr. Boorman. The defendant was heartstruck and in shock. While the brevity of time spent in consultation between counsel and appellant does not, without more, establish ineffectiveness instead is only a factor to be considered in the totality of the curcumstances.Carbo v. US, CA 5th, 1978, 581 F.2d 91,92,93.[17]

Through the mind of the appellant passed the realization that all hopes of any sentencing reduction consideration had been dashed by defense counsel's ineffectiveness and unprofessionalism in not obtaining said affidavit. Defense counsel stood and announced to the court and prosecutor the self-same news of his inability to produce the document, key to the plea agreement. The prosecutor rose instantly and enthusiastically said "We're backing out of our deal." The Honorable David S. Young retorted, "I agree," and forthwith and without further consideration, sentenced Appellant to the full, undiminished, no longer plea bargained sentence of 1 to 15 years in the Utah State Prison. Appellant was remanded to the custody of the Salt Lake County Sheriff for transport to the Utah State Prison, lacking any further action by defense counsel.

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[17] Carbo v. US, When a guilty plea is entered the only required duty of counsel in rendering reasonably effective assistance is to ascertain if the plea is entered voluntarily and knowingly ... the brevity of time spent in consultation with counsel does not without more, establish ineffectiveness but instead is only a factor to be considered in the totality of the circumstances.

CONCLUSION

Appellant concludes that the wanton disregard for professionalism, the unreasonableness of the last second disclosure of counsel's inability to procure the doctor's affidavit, the abject unfairness of non-pursuit in seeking remedy for the inability to procure said affidavit by means of continuance, subpoena, renegotiation, and/or withdrawal of plea, and the objective ineffectiveness of counsel's assistance to appellant, so undermined the proper functioning of these proceedings that they "cannot be relied on as having produced a just result"; Indeed, but for defense counsel's unprofessional errors and ineffective counsel, the results of the proceedings would have been significantly different;

Therefore, appellant asserts and claims ineffective assistance of counsel in that his Sixth Amendment rights to effective assistance of counsel in these criminal proceedings were indeed violated.

Strickland v. Washington, 466 US 687-692 (1984)[18]

McMann v. Richardson, 397 US 759, 771 n.14 (1970)[19]

US v. Scott, CA 5th, 625 F.2d 623 (1980)[20]

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[18] see footnote #1 and #5 and other Strickland refs.

[19] McMann v. Richardson, "6th Amendment rights to counsel is right to effective assistance of counsel."

[20] US v. Scott, "A conviction on a guilty plea that is entered solely as a result of faulty advice is a miscarriage of justice."

Strater v. Garrison, 611 F.2d 61 (CA 4th 1979)[21]

Osborn v. Shillinger, 861 F.2d 613 (CA 10th 1988)[22]

And further, prays this Court to remand this case to the District Court with an order to allow appellant to withdraw His plea of guilty.

Respectfully Submitted This 4th day of January, 1993

Eduardo Garza

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[21] Strater v. Garrison,"Judgement of conviction must be vacated when it appears that a guilty plea would never have been tendered if defendant had been properly advised."

[22] Osborn v. Shillinger, "performance of defense counsel was not only constitutionally unreasonable and ineffective, but counsel abandoned required duty of loyalty to his client..."